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No. 87 —

In The

Supreme Court of the United States

OCTOBER TERM, 1987

FLORETTA DUKES MCKENZIE,
SUPERINTENDENT OF SCHOOLS, *et al.*,
Petitioners,

v.

JUANITA M. JONES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

The court of appeals held that a public employer can test employees in positions affecting public safety for drug use without particularized cause only if the test employed detects on-the-job drug use or impairment. Urine testing for drug use, widely employed to ensure that employees in such positions are drug free, cannot detect on-the-job use or impairment. This case presents the issue:

Whether the Fourth Amendment precludes a public employer, which has evidence of a serious drug problem among its employees in jobs affecting public safety, from requiring urine testing as a prophylatic measure to deter and prevent on-the-job drug use or impairment by illicit drugs.

PARTIES

Petitioners Floretta Dukes McKenzie, Superintendent of District of Columbia Public Schools; William J. Bedford, Director of the Division of Logistical Support, D.C. Public Schools; and the District of Columbia were appellants below. Respondent Juanita M. Jones, a past and current D.C. Public Schools employee, was appellee.

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Floretta Dukes McKenzie, Superintendent of the District of Columbia Public Schools; the Director of the Division of Logistical Support, D.C. Public Schools; and the District of Columbia, petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 833 F.2d 335 (D.C. Cir. 1987), App. 1a - 13a. The opinion of the district court is reported at 628 F. Supp. 1500. App. 14a - 29a. The order from which the appeal below was taken (App. 30a - 31a) is not reported.

JURISDICTION

The initial judgment of the court of appeals was entered on November 17, 1987. App. 32a. On December 16, 1987,

respondent filed a timely petition for reconsideration. On January 19, 1988, the court of appeals denied the petition for reconsideration. App. 33a.

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

On the basis of "strong evidence of a veritable 'drug culture' " (App. at 11a) among its employees charged with transporting handicapped school children, the D.C. Public Schools instituted a program requiring those employees to undergo urine tests for drug use as part of a yearly mandatory physical examination. The United States Court of Appeals for the District of Columbia Circuit held that the Public Schools could require urine testing for drug use, without particularized cause, only to the extent that such testing detects on-the-job drug use or impairment. The court of appeals' decision precludes employers from requiring urine tests for drug use as a prophylatic measure to deter and prevent drug use by employees who affect public safety —— even where, as in this case, the employer has evidence of a serious drug problem in the workplace and utilizes tests in a minimally intrusive context as part of a physical examination.

1. In 1984 the D.C. Public Schools had "strong evidence of a veritable 'drug culture' " among Transportation Branch employees (App. at 11a), whose principal duty is the daily transportation of handicapped school children between their homes and schools:

> There were repeated incidents of bizarre or dangerous drug-related behavior by drivers and attendants while

> on duty; syringes and bloody needles were found in restrooms used by Transportation Branch employees; and the head of the Branch estimated "that 60% of the employees assigned to the Transportation Branch are using narcotics to some extent."

App. at 3a (footnote omitted). The court of appeals concluded that the situation was sufficiently serious so that "it would have been patently irresponsible for school officials to have ignored [it]." App. at 11a.

School officials attempted to control this problem in a variety of ways: by transferring and terminating problem employees; by continuous, close supervision at bus compounds; even by the use of undercover agents (who, unfortunately, were promptly identified as such). In addition, the transportation unit supervisors sought help from the Metropolitan Police Department as well as from the school system's own security force. When these efforts failed, they sought to implement a drug testing program for transportation employees.

The drug testing program was established by Superintendent's Directive 205.1, issued June 12, 1984. It provides for mandatory "urinalysis testing of all employees who are or will be required to undergo medical examinations to determine physical fitness for licensing and other employment related reasons."[1] Physical examinations were required of all Transportation Branch employees.[2]

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[1] The directive also provides for testing "any employee who displays behavior or action which can be construed as a threat to the safety or well being of the students, staff, and public or [is] detrimental to the effective functioning of programs and activities of D.C. Public Schools * * *." The court of appeals held that "this provision is not involved in the present litigation." App. at 4a, n.4.

[2] Bus drivers had previously been required to undergo annual physicals. On June 19, 1984, it was determined that bus attendants would also be required to undergo annual physicals. Bus attendants are "responsible for assisting handicapped children on and off the bus. In some cases this require[s] physically carrying the child." App. at 5a.

By memorandum dated June 22, 1984, transportation employees were notified in writing that "during your upcoming physical, as part of normal urinalysis testing, screening for narcotics and other controlled substances will be conducted." All two hundred employees in the Transportation Branch had urinalysis ("EMIT") tests for drugs between late June and late August, 1984. Test results showed that twenty-six of the employees in respondent's classification had recently used drugs.[3]

Respondent Juanita Jones was employed by the School System from year to year as a bus attendant "responsible for supervising, attending, and carrying handicapped children." App. at 11a. The court of appeals found that this position involved significant safety concerns: "the danger to a young, handicapped child, should she be dropped by an attendant or ignored while crossing the street is obvious." *Id.* As much as three or four hours of an attendant's day is spent on the bus during which time she is not under the eye of supervisory school officials.

Ms. Jones underwent a physical and was tested for drugs during the summer of 1984. She tested positive for marijuana use. On learning of this result, the school system terminated her employment.

2. After an unsuccessful administrative appeal, Ms. Jones brought this action alleging that her termination violated her rights under the Constitution and under local law. She alleged, among other things, that Public Schools' policy of conducting urinalysis screening for drugs without probable cause violated her Fourth Amendment right to be free from unreasonable searches and seizures.

The district court entered partial summary judgment for Ms. Jones. It held that her termination on the basis of a

[3] Respondent was classified as WAE (when actually employed). Twenty-six WAE employees tested positive. App. at 5a. The record in this case does not reflect how many non-WAE employees (i.e., full-time employees) also tested positive. *Id.*, n.5.

single, unconfirmed urine test was arbitrary and capricious and thus violated the school system's own regulations. It also held that requiring her to submit to a urine test "in the absence of particularized probable cause" violated her rights under the Fourth Amendment. App. at 29a. The court ordered her reinstated with back pay. It also enjoined the school system from administering "any urinalysis test for drug use to plaintiff without first establishing probable cause to believe that she is using or under the influence of illicit drugs based on specific objective facts * * *." App. at 30a.

3. The school system appealed only the district court's ruling that the Fourth Amendment prohibits the administration of any drug test without probable cause. It filed with the district court a directive by the Superintendent ordering that no disciplinary action be taken against any employee on the basis of a urinalysis test unless the test is confirmed by a separate test using a different methodology.[4] It defended its testing program entirely on the grounds that, in light of its serious drug problem among these employees, it could require urine testing to deter and prevent drug use or impairment on the job. App. at 35a - 36a, 38a.

The court of appeals noted that this case concerned only whether employees could be tested to determine if they had used illicit drugs, and not what action could be taken with respect to employees who had used drugs. App. at 9a. It held that the school system "acted pursuant to a significant and compelling governmental interest in requiring drug testing for Transportation Branch employees * * *." App. at 11a. That interest arose from the significant danger to the physical safety of handicapped school children that could result from impaired performance of these particular jobs, and from the strong evidence of a serious drug problem among those employees. *Id.* The court also recognized that, because "this case involves only testing that is conducted

[4]The school system contemplated using the EMIT test for preliminary screening, subject to confirmation by a different test. *See* App. at 37a.

as part of a routine, reasonably required, annual medical examination," App. at 12a, "[t]his has the effect of ensuring that the intrusion on the employee's privacy is minimized." *Id.* The intrusion here is that "such tests may provide Government officials with a periscope through which they can peer into an individual's behavior in her private life * * *." *Id.* at 10a.

The court held that, in this context, drug testing without particularized cause is justified, but only if the test employed detects on-the-job drug use or impairment.[5] This ruling precludes the school system from using urine tests, as it has, as a prophylactic measure to deter and prevent on-the job drug use or impairment.[6]

REASONS FOR GRANTING THE PETITION

The court of appeals held that, even where a public employer has strong evidence of a serious drug problem among employees affecting public safety, it cannot require

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[5] " [A]ny drug test the School System employs in the future must be one that *validly detects* the activity with which the School System is legitimately concerned." App. at 12a. (emphasis supplied). "[A]ppellant's legitimate concern [is] that its employees not possess, use, or be under the influence of drugs while on duty * * *." App. at 9a.

[6] The court of appeals ruled in the school system's favor in that it "vacate[d] that portion of [the] injunction from which the appeal was taken." App. at 13a. However, the school system continues to have a stake in the appeal: respondent is seeking attorneys' fees in the district court for obtaining the ruling the school system seeks to have reviewed here. *See Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 334 n.6 (1980). Furthermore, the school system still wishes to require respondent to undergo prophylactic urine testing as before (with the addition of a confirming test, if needed), but is effectively prevented from doing so by the decision below and that of the district court in *National Federation of Federal Employees v. Carlucci,* No. 96-0681, 1988 WestLaw 17239, 56 U.S.L.W. 2512 (D.D.C. March 1, 1988), construing the decision below. In light of those rulings, the school system's officials responsible for testing respondent in such manner might be hard-pressed to claim that good-faith immunity shielded them from personal liability. Therefore, the school system has a continued interest in reversing the court of appeals' ruling on the issue presented in this petition. *See Electrical Fittings Corp. v. Thomas & Betts Co.,* 307 U.S 241 (1939).

drug testing without particularized cause except insofar as that testing detects on-the-job drug use or impairment. Urine testing for illicit drug use, which is widely used by public and private employers alike to prevent drug use by employees in safety-sensitive positions, cannot detect on-the-job drug use or impairment; it can only reinforce other evidence of impairment or use on the job:

> Although urine screening technology is effective in determining prior drug use, *positive results of a urine screen do not prove intoxication or impaired performance.* Drugs or their metabolites may appear in urine for several days, even weeks (depending upon the drug), without apparent impairment. *Screening may be used to support evaluations of impairment,* identified as performance deficiencies or histories of safety or behavioral problems.

National Institute on Drug Abuse, *Consensus Summary: Interdisciplinary Approaches to the Problem of Drug Abuse In the Workplace* (DHHS. Pub. No. (ADM) 86-1477, 1986) at 6-7 (emphasis supplied).[7] The court of appeals' decision raises a serious question about whether it is constitutionally permissible for a public employer to use urine drug tests at all. It squarely holds that a public employer may not constitutionally use such tests for prophylactic purposes, to deter or prevent on-the-job drug use or impairment. This decision warrants review by this Court for three reasons.

First, public employers need guidance on this issue. Many federal and local government agencies have urine-testing programs designed to deter and prevent drug use in positions affecting public safety. The circuit courts of appeals are divided as to whether such prophylactic programs are constitutional. While the issue is involved in *National Treasury*

[7]The court of appeals was so informed at oral argument: "there is no urinalysis test that can show whether a person is impaired by drugs, because of the scientific nature of the urinalysis test. It does not test whether there [are] active ingredients of drugs in your system." App. at 39a.

Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, No. 86-1879 (February 29, 1988), the central focus of that case is on protecting the integrity of law enforcement employees and functions, rather than protecting public safety. Protecting that integrity interest (which includes, for example, preventing occasions for blackmailing or corrupting law enforcement officers) implicates the use of illicit drugs off the job in ways that ensuring safe job performance does not. Therefore, that case may provide little, if any, guidance for cases like this one where the sole government interest involved is protecting public safety. The many government employers who have urine-testing drug programs for safety-sensitive jobs, however, should know whether they are violating the Constitution. Furthermore, because this case and *von Raab* are different in a number of other significant respects, granting review in this case, as well as in *von Raab*, would provide vastly greater guidance for public employers as to what programs for combating employee drug abuse are consistent with the Fourth Amendment.

Second, the Court should resolve the conflict among the circuits over whether public employers may require urine testing of employees in jobs affecting public safety in order to deter and prevent illicit drug use, rather than just to detect and address incidents of on-the-job impairment after they have occurred. Both the Eighth Circuit in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), and the Fifth Circuit in *von Raab*, have held that safety concerns may provide a constitutional justification for purely prophylactic testing. The District of Columbia Circuit in this case, and the Ninth Circuit in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *petition for certiorari pending sub nom. Burnley v. Railway Labor Executives' Ass'n.* No. 87-1555, have held that urine drug tests may only be used to detect whether incidents that have already occurred were caused by drug impairment. The constitutionality of prophylactic drug testing should not depend on the circuit in which an action is brought.

Third, the decision below is wrong. A practice is reasonable under the Fourth Amendment, and therefore constitutional, if the need for the particular government inquiry outweighs the intrusion on legitimate privacy interests. The need for drug testing here was compelling: there was strong evidence of a serious drug problem among employees whose impaired performance would threaten the safety of school children. The test was tailored to minimize the intrusion on employee privacy interests: the urine sample was provided by the employee in a private setting as part of a physical. The court of appeals was simply wrong in concluding that the school system's legitimate objective of preventing on-the-job use or impairment is only sufficiently served by detecting incidents of such conduct after they have occurred. The school system has a powerful interest in adopting prophylactic measures to prevent employees in these safety-sensitive jobs from being impaired on the job at all. The Constitution does not require it to wait until harm has been done and then to address the problem piecemeal.

1. *Guidance is needed.*

Many employers, both public and private, have implemented urinalysis testing of employees for illicit drug use. *See* Willette, *Drug Testing Programs*, in Hawks and Chiang, *Urine Testing For Drugs of Abuse* (Research Monograph No. 73, National Institute of Drug Abuse, 1986) at 5-12 (listing a variety of federal agencies that have implemented such testing,[8] and stating that "90 percent" of all nuclear power plants, "many" nonnuclear power and gas companies, and "30 percent" of the Fortune 500 companies have adopted drug-testing programs).

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[8]Those federal agencies include the Federal Aviation Administration, Drug Enforcement Administration, Federal Bureau of Investigation, U.S. Customs Service, National Aeronautics and Space Administration, and Federal Protection and Safety Division of the Government Services Administration.

Those programs are intended to safeguard the employer's interest in the integrity of its employees and operations, or its interest in safe operations, or both. Programs for law enforcement or security officers are principally based on the employer's interest in ensuring that officers are not subject to blackmail or corruption, and that they are not perceived as engaging in or condoning conduct that they are charged with policing. *See, e.g., National Treasury Employees Union v. von Raab, supra,* 816 F.2d at 178 (drug use by customs officials may increase their susceptibility to bribery and blackmail and cast doubt upon their ability to enforce the law vigorously). Programs for employees involved in transportation or other services posing significant risks of injury are based on safety concerns. *See, e.g., Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency,* 663 F. Supp. 1560, 1568 (C.D. Cal. 1987) ("The risk of public safety inherent in * * * drug abuse by transportation employees is obvious; one chemically-induced accident could result in death or serious injury to dozens of passengers.").

Urine testing by public employers of employees involved in transportation and other safety-sensitive jobs is widespread. *See, e.g., American Federation of Government Employees v. Dole,* 670 F. Supp. 445 (D.D.C. 1987), *appeal docketed,* No. 87-5117 (D.C. Cir. 1987) (random urinalysis testing of approximately 30,000 civilian federal Department of Transportation employees, including air traffic controllers, aircraft mechanics, and hazardous materials handlers); *National Federation of Federal Employees v. Carlucci, supra* (random urinalysis testing of civilian employees of federal Department of Defense, including 2,800 in aviation positions, such as air traffic controller, aircraft mechanic and aircraft attendant); *Division 241, Amalgamated Transit Union v. Suscy,* 538 F.2d 1264 (7th Cir. 1976), *cert. denied,* 429 U.S. 1029 (1976) (bus drivers for the Chicago Transit Authority blood and urine tested after a serious accident); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency, supra* (random urine tests for city bus drivers and

maintenance employees); *Gray v. New York City Transit Authority*, 128 App. Div. 2d 528, 512 N.Y.2d 261 (1987) (urine testing for drugs as part of promotion physical for signal maintenance helper).

A principal purpose of urine testing for jobs affecting public safety is prophylactic: "to prevent . . . drug abuse in the workplace." Walsh and Hawks, *Employee Drug Screening: Detection of Drug Use by Urinalysis* (DHHS Pub. No. (ADM) 86-1442, 1986) [hereinafter Walsh and Hawks] at 1. *See also id.* at 4 (urine screening "a drug use deterrent"). There are various strategies for accomplishing this. One is "an incident driven policy wherein screening occurs only after an accident or incident (*e.g.*, a fight) or other 'probable cause' event." *Id.* at 3. *See, e.g., Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *petition for certiorari pending sub nom. Burnley v. Railway Labor Executives' Ass'n*, No. 87-1555. Another —— that used by the D.C. Public Schools here —— involves "routine scheduled screening" which "is often tied to evaluation for fitness for duty or to annual physical examination." Walsh and Hawks, *supra*, at 3. A third is "periodic unannounced or random testing." *Id.* *See, e.g., American Federation of Employees v. Dole, supra*, 670 F. Supp. at 446 n.3.

An "incident driven" practice operates for the most part after injury has already occurred. In contrast, both routine scheduled testing and random, or unannounced, testing are designed to prevent harm, either by deterring employees from using drugs, or by enabling the employer to identify drug-using employees and take steps (ranging from counselling, to transfer, to termination) to ensure that they do not use drugs while in safety-sensitive jobs.

The court of appeals' decision in this case, by holding that a public employer can use only tests which "detect" on-the-job use or impairment, may prevent public employers from adopt-

ing any of these strategies.[9] It certainly prevents the adoption of a drug testing program designed to prevent on-the-job impairment before damage has been done. Because these drug-testing practices are so widespread, and because of the important government interests they are designed to protect, this Court should provide guidance as to the constitutionality of these practices.

2. *There is a conflict among the circuits.*

a. The circuits are in conflict over whether public employers may require urine testing of employees in jobs affecting public safety in order to deter and prevent illicit drug use, rather than just to detect and address incidents of on-the-job impairment after injury has occurred. The Eighth Circuit approved random urinalysis of corrections officers, whose jobs require regular contract with inmates, to ensure the safe performance of their duties and to prevent security breaches, with their attendant risks to the public. *McDonell v. Hunter*, 809 F.2d 1302, 1308 (8th Cir. 1987). Random testing is necessarily prophylactic in nature. Similarly, the Fifth Circuit in *von Raab* approved prescheduled testing without particularized cause for applicants for transfer and initial hire into positions requiring the carrying of firearms. 816 F.2d at 173. This requirement was justified by the need to ensure safe job performance. *Id.* at 178. It, too, was designed to deter and prevent drug use, rather than simply to detect on-the-job impairment after harm has occurred. *See id.* at 180 ("The risk of detection therefore may deter drug-using employees from seeking more

[9]The Ninth Circuit in *Burnley, supra*, concluded, in reliance on the court of appeals' decision in this case, that, because urine tests cannot themselves detect on-the-job impairment, even an "incident driven" practice is unconstitutional absent "individualized suspicion" based on "observable symptoms of impairment." 839 F.2d at 589. However, because a positive urine test for drugs provides one piece of evidence that a given incident could be drug-related, and in that sense contributes to "detecting" drug use, the court of appeals' decision in this case need not be read to preclude "incident driven" testing.

sensitive positions"). On the other hand, both the District of Columbia Circuit in this case, and the Ninth Circuit in *Burnley, supra*, have held that drug tests may only be used to the extent that they detect on-the-job use or impairment, which limits employers to investigating incidents that have already occurred. This Court should resolve that conflict.

b. This Court's resolution of the issues in *von Raab* may not provide guidance for this case, and others like it, that involve safety concerns. The central focus of *von Raab* is the integrity of law-enforcement employees and functions: protecting against blackmail and corruption, and defusing public suspicion that officers engage in or condone conduct which they are charged with policing. Use of illicit drugs by officials charged with interdicting the traffic in such drugs, regardless of whether it occurs on or off duty, implicates those concerns. In contrast, in cases like this one, the employer is seeking to ensure safe job performance and to prevent on-the-job use or impairment. The question is whether the employer's interest in ensuring safety permits the employer to require that individuals in these positions be drug-free; to deter drug use by these employees altogether; or to identify employees in such jobs who use illicit drugs so that the employer may take steps to prevent those employees from being impaired by drugs on the job. This Court's resolution of the issues in the context where the public employer's overriding concern is public integrity may provide little guidance for cases involving public safety.

c. Granting review in this case would provide guidance for public employers who have adopted drug-testing programs for safety reasons. It would permit the Court to address squarely the question of whether a public employer may adopt a program to prevent on-the-job impairment, or whether the employer must wait until employees in safety-sensitive jobs are impaired on the job. Furthermore, granting review of this case, in addition to *von Raab*, would provide a good deal of additional insight into what the Fourth Amendment requires with respect to the whole area of public employer drug testing.

While "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable," *New Jersey v. TLO,* 469 U.S. 325, 337 (1985), "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish,* 441 U.S. 520, 559 (1977). This case and *von Raab* are different in a number of important respects concerning both the need for the testing program and its intrusiveness. The Court's treatment of both would provide considerable insight into what the Fourth Amendment requires of public employers in safeguarding against employee drug use in varying circumstances.

In *von Raab,* "[t]he Customs Service did not attempt to justify screening on the ground that it suspected a significant level of drug use among its employees." 816 F.2d at 173. By contrast, here the D.C. public school system had strong evidence of such a serious problem that the court of appeals observed that "it would have been patently irresponsible for school officials to have ignored [it]." App. at 11a. On the other hand, as discussed above, the Customs Service program in *von Raab* was needed for reasons of public integrity as well as public safety.

The program in this case is less intrusive than that in *von Raab* in that it only involves analyzing urine produced for a legitimately required employment physical. In this case, the employee's only privacy interest is in protecting the "physiological secret[]" of illicit drug use *Von Raab, supra,* 816 F.2d at 175. In *von Raab* there was, in addition, the interest against having to pass urine publicly. *Id.* On the other hand, the program here may be regarded as more intrusive than that in *von Raab* because the school system's transportation employees are not permitted to choose an option that permits them to avoid testing.

3. *The decision below is wrong.*

The court of appeals recognized that balancing the school system's needs against employees' privacy interests compelled the conclusion that testing these school employees for drug use without particularized cause was justifiable. It concluded, however, that, since the school system's legitimate interest was preventing on-the-job use or impairment, only a test which detected such use or impairment could pass constitutional muster.

The court of appeals was clearly correct in its assessment of the balance of interests; it was wrong in concluding that the school system's legitimate objective of preventing on-the-job use or impairment is only sufficiently served by detecting instances of such conduct after the fact.[10] Where, as in this case, a public employer has proof of a serious drug problem among employees in safety-sensitive positions, it has a powerful interest in adopting prophylactic measures to prevent employees in such positions from being impaired by illicit drugs on-the-job and should not be constrained to await individual incidents of impaired job performance and to address the problem piecemeal.

The school system's need to take measures to prevent drug abuse by its transportation employees was imperative. There was strong evidence of a very serious drug problem among the employees. Drug impairment by employees in these jobs directly threatens the physical safety of school children. Therefore, as the court of appeals recognized in very strong language (App. at 11a), school officials had a duty to take steps to eliminate the problem. They had tried a number of alternatives, and only when these failed, had instituted drug testing. The court of appeals correctly concluded that

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[10]The court did not provide an explanation of the reasoning supporting this conclusion, but merely asserted that "appellants do not appear to challenge it." App. at 12a. Appellants repeatedly challenged that point at oral argument. App. at 35a - 36a, 38a.

there was "a significant and compelling governmental interest in requiring drug testing for Transportation Branch employees * * *." App. at 11a.

The testing here was tailored to avoid unduly trenching on privacy interests. Because "this case involves only testing that is required as part of a routine, reasonably required annual medical examination" (App. at 12a), "the intrusion on the employee's privacy is minimized." *Id.* The employee's interests in privacy in providing a urine sample were not implicated, but only the interest in preventing the urine from being subjected to a test to determine illicit drug use. In addition, care was taken to avoid harming employee sensibilities: specimens were given at a clinic in the privacy of a restroom.

Furthermore, while the drug screening might reflect conduct that occurred off the job, in that regard it is not unlike other unquestionably valid employment requirements——such as medical examinations (which may reflect, for example, off-the-job alcohol abuse) and background checks——which are permissible because they seek information relevant to the job in question. Particularly where, as here, there is a serious problem with drug use on the job, and the test detects employees who have used drugs even after a warning——that is, when doing so was risky, as well as illegal——drug use by these employees is clearly relevant to the requirements of their safety-sensitive jobs.

While the court of appeals characterized the privacy interests involved here as "strong" (App. at 10a), it correctly recognized that they were outweighed by the "*serious* safety concerns on the others side of the balance." *Id.* (emphasis in original).

Nevertheless, the court of appeals concluded that, even where on-the-job drug impairment clearly threatens serious safety concerns, a public employer may not adopt prophylactic measures to prevent such impairment, but can only address instances of such conduct after they have manifested

themselves. The Constitution does not require that result. This Court should make that clear.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this Court should hold the petition in abeyance pending the decision in *National Treasury Employees Union v. von Raab,* No. 86-1879, and remand for reconsideration in light of that decision.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5198

JUANITA M. JONES

v.

FLORETTA DUKES MCKENZIE,
SUPERINTENDENT OF SCHOOLS, et al., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 85-01624)

Argued October 2, 1987

Decided November 17, 1987

Charles L. Reischel, with whom *Frederick D. Cooke, Jr.* and *James R. Murphy* were on the brief, for appellants.

David A. Soley, with whom *Jeffrey A. Dunn, Gary M. Hnath, Arthur B. Spitzer* and *Elizabeth Symonds* were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Richard K. Willard, Assistant Attorney General, Department of Justice, *Joseph E. diGenova*, United States Attorney, and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief for *amicus curiae*, United States, urging reversal in part.

Before: EDWARDS, STARR and D. H. GINSBURG, *Circuit Judges.*

Opinion for the Court by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: This case involves a suit by the appellee, Juanita Jones, against the District of Columbia and those officials in the District of Columbia Public School System responsible for the employee drug-use surveillance program.[1] Ms. Jones, who had been employed in the Transportation Branch, challenged the School System's decision to discharge her for an alleged violation of a directive prohibiting school personnel from using, possessing or being under the influence of illicit drugs while on school premises. In granting summary judgment in appellee's favor, the District Court ordered Ms. Jones reinstated with full backpay, seniority and benefits; enjoined the appellants from terminating Ms. Jones on the basis of the EMIT drug test without confirmation from some adequate alternative testing device; and enjoined the appellants from administering *any* urinalysis drug test to Ms. Jones "without first establishing probable cause to believe that she is using or under the influence of illicit drugs based on specific objective facts." The School System has appealed only that portion of the District Court's order that prohibits compulsory drug testing without "probable cause."

On the record before us, we find that it is not unreasonable to require drug testing where an employee's duties involve direct contact with young school children and their

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[1] The appellants, collectively, hereafter will be referred to as the "School System."

physical safety, where the testing is conducted as part of a routine, reasonably required, employment-related medical examination, and where there is a clear nexus between the test and the employer's legitimate safety concern. We therefore reverse the District Court's judgment pertaining to "probable cause," and vacate that portion of its injunction from which appeal was taken.

I. Background

In 1984, the School System initiated a program of mandatory drug testing for employees in its Transportation Branch. These employees included bus drivers, mechanics and bus attendants, whose primary duty was the daily transportation of handicapped students between their homes and schools.[2] The drug testing program had its impetus in growing concern among School System officials over a perceived "drug culture" in the Transportation Branch. There were repeated incidents of bizarre or dangerous drug-related behavior by drivers and attendants while on duty;[3] syringes and bloody needles were found in restrooms used by Transportation Branch employees; and the head of the Branch estimated "that 60% of the employees assigned to the Transportation Branch are using narcotics to some extent." Letter from William French to William Bedford (May 17, 1984) ("French Letter"), Record Excerpts ("R.E.") 34-35; Defendants' Interrogatory Answer 6, R.E. 48. Efforts to deal with

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[2] The Branch also transported other students to athletic and special events.

[3] For example, one bus attendant "went into an uncontrolled coma and passed out on the floor of the bus;" another "went off" in a supervisor's office, "screaming, laughing, rolling in [sic] the floor, disarrying [sic] her dress, etc." A driver trainee who "could see little green soldiers coming up out of the black top" tried to enlist co-workers and supervisors in his army and saw a parked bus as a combat jeep. Letter from William French to William Bedford (May 17, 1984), Record Excerpts 34-35.

the problem had yielded only mixed results. French Letter, R.E. 35-36.

The School System's concern about drug use culminated in Superintendent's Directive 205.1, issued June 12, 1984, which provided for mandatory urinalysis testing "of all employees who are or will be required to undergo medical examinations to determine physical fitness for licensing and other employment-related reasons." R.E. 39.[4] It added that a "confirmed finding of an illicit narcotic substance in the urine of an employee" or a refusal to submit to testing would be "grounds for termination." R.E. 40. The employees were informed in advance that the physical examinations would include urinalysis testing for drugs. Bedford Memorandum (June 22, 1984), R.E. 43. Both Directive 205.1 and the notification to employees explained that the purpose of the drug tests was the enforcement of Superintendent's Directive 662.13, dating from 1977, which prohibited school personnel "to possess, use or be under the influence of intoxicating liquors, narcotics, or other drugs such as LSD, marijuana and the like, while on school premises." Supplemental Record Excerpts ("S.R.E.") 87.

Pursuant to the newly issued directive, Transportation Branch employees were administered physical examinations at a clinic during the summer of 1984. As is the normal procedure in medical examinations, they were permitted to produce their urine specimens in the privacy of

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[4] While theretofore only bus drivers had been required to undergo annual physical examinations, that policy was changed to require such examinations of all Transportation Branch employees. French Memorandum (June 19, 1984), R.E. 41.

Directive 205.1 also provided that any employee could be tested "who displays behavior or actions which can be construed as a threat to the safety or well being of the students, staff, and public or are detrimental to the effective functioning of programs and activities of D.C. Public Schools." R.E. 39. This provision is not involved in the present litigation.

a restroom. The urine samples were tested with the EMIT Cannabinoid Urine Assay. A total of 26 Transportation Branch employees classified as WAE (when actually employed) tested positive for illegal drugs and were "terminated." Defendants' Interrogatory Answer 19 & attachment C, Record Document ("R.D.") 18.[5]

Appellee Juanita Jones was employed, on a WAE basis, as a school bus attendant in the Transportation Branch beginning in February 1981. As such, she was paid for hours actually worked (averaging 30-35 per week), received no leave or other benefits, and was re-employed each year for a one-year term "subject to the availability of funds." In her job, Jones was responsible for assisting handicapped children on and off the bus. In some cases this required physically carrying the child. She was also responsible for ensuring that the children were properly seated and for maintaining order during the sometimes lengthy bus trips. She was considered to be an excellent employee. S.R.E. 30, 56, 82-86.

Jones underwent a physical examination and was tested for drugs along with other Transportation Branch employees in the summer of 1984. Her test was positive for THC metabolites, an indication of marijuana use.[6] Upon

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[5] The record contains no information on how many full-time employees tested positive and whether they were also fired.

[6] Jones contends that she never used marijuana or any other illegal drugs during her period of employment with the School System. Plaintiff's Pretrial Statement, S.R.E. 30. In a letter to the Superintendent of Schools she stated that during the weekend prior to the positive test she had been in the presence of several people who were smoking "something other than tobacco." Letter from Juanita Jones to Floretta D. McKenzie (undated), Defendants' Document Production, Exhibit I, R.D. 18, *reprinted in* Brief for Appellants at 9. The District Court found that the EMIT test "does not indicate with respect to marijuana whether the ingredient was ingested by active use or as a result of passive

learning of Jones' test result, the School System terminated her employment. Following the School System's denial of Jones' request for a hearing and its rejection of her written appeal, she filed suit in the District Court, seeking injunctive relief and damages under 42 U.S.C. § 1983 for violation of her rights under the Fourth and Fifth Amendments and District of Columbia statutes.

On February 25, 1986, the District Court entered partial summary judgment for Jones. It held that her termination on the basis of a single, unconfirmed EMIT test, without a hearing, was arbitrary and capricious and thus violative of District of Columbia law.[7] It also held that, "in the absence of particularized probable cause," requiring her to submit to drug testing was an unreasonable search. The trial court ordered Jones reinstated with full backpay, seniority and benefits; ordered that any mention of the termination be expunged from her personnel records; enjoined the School System from terminating her on the basis of the EMIT test without adequate confirmation by other means; required that any future termination be preceded by meaningful notice and an opportunity to be heard, and followed by the right to a hearing; and enjoined the School System from administering any drug test to her "without first establishing probable cause to believe that she is using or under the influence of illicit drugs based on specific objective facts." *Jones v. McKenzie*, No. 85-1624 (D.D.C. Feb. 25, 1986) (order), *reprinted at* R.E. 31-32; *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986). Jones' claim for damages was subsequently settled.

The School System has acquiesced in most of the District Court's order. It appeals only the trial court's

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inhalation in the presence of others who were smoking marijuana." *Jones v. McKenzie*, 628 F. Supp. 1500, 1503 (D.D.C. 1986).

[7] Because of this statutory violation, the court found it unnecessary to reach the constitutional due process issue.

Fourth Amendment ruling which prohibits the administration of any drug test without probable cause.

II. Analysis

A. *The Legal Framework*

The Fourth Amendment protects against "unreasonable searches and seizures" by Government officials in civil as well as criminal contexts. *O'Connor v. Ortega*, 107 S. Ct. 1492, 1497 (1987) (plurality opinion); *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985). To determine whether a given governmental activity is of the kind that is prohibited by the Fourth Amendment, we must first ask whether the action is a "search," and, if it is, whether it is "unreasonable."

The first inquiry need not detain us long. A "search" is a governmental action that infringes "an expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). This court and virtually all others that have passed on the issue have held mandatory urinalysis of public employees to be a "search" which implicates the Fourth Amendment. *See, e.g., National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. (1987) (*"NFFE"*); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987); *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 67-68, 510 N.E.2d 325, 329-30, 517 N.Y.S.2d 456, 460-61 (1987).[8] Even if, as in this case, the urine specimen is collected under conditions which do not seriously invade the individual's privacy, *analysis* of

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[8] *But cf. Everett v. Napper*, 825 F.2d 341, 345 (11th Cir. 1987) (per curiam), where the court held, without analysis, that there was no "search" when an employee was fired for refusing to submit to urinalysis. Whatever the merit of this view, it is not the case before us.

the urine permits the Government to inquire into the employee's private life. It is beyond dispute that this constitutes a "search" for purposes of the Fourth Amendment.

While the second inquiry—whether the search is a "reasonable" one—is more difficult, our framework for analysis has been clearly laid out in decisions of the Supreme Court and this court. *See O'Connor*, 107 S. Ct. at 1499; *T.L.O.*, 469 U.S. at 337-43; *NFFE*, 818 F.2d at 942-43. We are required to balance the intrusion on the individual's Fourth Amendment interests, *i.e.*, the privacy expectations which society recognizes as legitimate, against the governmental interest involved, such as the public employer's interest in "the efficient and proper operation of the workplace." *O'Connor*, 107 S. Ct. at 1502. In striking this balance, we must consider both whether the search was justified at its inception, and whether the search as actually carried out was reasonably related to its objectives and not excessively intrusive. *T.L.O.*, 469 U.S. at 341-42; *NFFE*, 818 F.2d at 943.[9]

B. *The Narrow Question Presented in this Case*

Before applying this framework to the facts of the present case, we think it important to make clear the

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[9] In balancing these considerations we are mindful that "[u]nder certain circumstances, the Government may deprive public employees of some of the rights they would have as citizens . . . [because] sometimes a citizen's full enjoyment of his constitutional rights may be demonstrably incompatible with the mission of the particular public agency employing him." Kamisar, *Drugs, AIDS and the Threat to Privacy*, N.Y. Times, Sept. 13, 1987, § 6 (Magazine), at 109, 110-11; *cf. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding restrictions on public employees' First Amendment right to engage in political activity); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (same).

narrow focus of our inquiry. The only issue in this case is the propriety of the District Court's blanket injunction prohibiting *any* drug testing in the absence of probable cause. The School System does not argue that it can require drug tests absent individualized suspicion outside the context of a regular, employment-related medical examination, and no claim has been raised that the annual physical examination required of Transportation Branch employees is anything but that. Thus, this case focuses solely on drug testing in the context of a regular medical examination for employment purposes; it does not pose the question of what measures the School System could constitutionally take outside this context, *e.g.*, what level of suspicion might be required for random or individualized testing.

Furthermore, the School System has conceded that the EMIT test is not a valid measure of whether the subject is in possession of, is using, or is under the influence of illicit drugs at the time of the test.[10] As this test therefore lacks a sufficient nexus to the appellant's legitimate concern that its employees not possess, use or be under the influence of drugs while on duty, it is clear that the School System could not constitutionally test its employees for drugs *in the manner Jones was tested*, and our analysis should not be read to suggest the contrary.

Finally, as the School System chose not to appeal that portion of the District Court's injunction ordering the plaintiff reinstated with full backpay and benefits, we have no occasion to consider the legality of possible sanctions for illicit drug use. We do not consider, for example, whether an employee may be automatically discharged in such a case.

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[10] Defendants' Admissions 15-17, S.R.E. 16, 21. The EMIT test, which detects metabolites of the chemical THC, associated with marijuana or hashish, "does not indicate when the ingredient was absorbed as THC metabolites may be retained in an individual's system for days or weeks." *Jones v. McKenzie*, 628 F. Supp. at 1503.

C. *Application of the Law to the Facts of this Case*

Having thus delimited the scope of our inquiry, we now apply the balancing test to the facts of this case. We note first that strong privacy interests are involved here. Because drug tests often furnish information about employee activities occurring outside of working hours, such tests may provide Government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home. As one court has put it, drug testing is "a form of surveillance," which "reports on a person's off-duty activities just as surely as [if] someone had been present and watching." *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1511 (D.N.J. 1986). Moreover, unlike the situation where an employee's office files are searched, a person cannot avoid the intrusion on her privacy associated with compulsory urinalysis "by simply leaving [personal belongings] at home." *O'Connor*, 107 S. Ct. at 1502.[11] These privacy interests can be outweighed only by strong governmental concerns.

Here there are *serious* safety concerns on the other side of the balance. There can be no doubt whatsoever that the School System's mission of safely transporting handicapped children to and from school cannot be ensured if employees in the Transportation Branch are allowed to work under the influence of illicit drugs. Any suggestion to the contrary would be preposterous. The case law on this point is clear that a governmental concern is particularly compelling when it involves the

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[11] Because in this case the intrusion results not merely from the taking of the urine sample, but from the information its analysis yields, this intrusion is not lessened by the fact that the employees were allowed to produce their urine specimens in the privacy of a restroom. Requiring that the specimen be produced under some form of observation would obviously raise different privacy concerns, which we do not address here.

physical safety of the employees themselves or of others. *See, e.g., Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (approving mandatory urinalysis of employees working around high-voltage electric wires, in view of reports of drug use). It is also noteworthy that the safety concern in this case was prompted not only by the nature of the jobs in the Transportation Branch, but also by the strong evidence of a veritable "drug culture" among Transportation Branch employees.[12] It would have been patently irresponsible for school officials to have ignored this situation.

The District Court correctly focused on these safety concerns, but it attempted to draw a distinction in this case between bus drivers and mechanics, who might constitutionally be subject to drug testing, and bus attendants, who could not be. 628 F. Supp. at 1508-09. We disagree with this judgment. While the safety concern may be somewhat greater for a school bus driver, it is still quite significant in the case of an employee who is responsible for supervising, attending and carrying handicapped children. For example, the danger to a young, handicapped child, should she be dropped by an attendant or ignored while crossing the street, is obvious. In light of these safety concerns, we find that the School System acted pursuant to a significant and compelling governmental interest in requiring drug testing for Transportation Branch employees as a part of routine employment-related medical examinations.[13]

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[12] The estimate that 60% of Branch employees were using drugs may have been exaggerated, *see* French Deposition, S.R.E. 127, but even a smaller figure could be indicative of a serious drug problem.

[13] We emphasize that our concern is for the physical safety of the students. We need not address the argument advanced by the appellants that drug testing could be justified by concerns about the children's emotional needs during the lengthy bus trips. *See* Brief for Appellants at 3 & n.5, 19-20. Neither do we address the situation raised in *Patchogue-*

If the drug testing was thus "justified at its inception," we must also ask "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place' " —in other words, whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive." *T.L.O.*, 469 U.S. at 341-42 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). We note here two significant factors. First, this case involves only testing that is conducted as part of a routine, reasonably required, annual medical examination. This has the effect of ensuring that the intrusion on the employee's privacy is minimized.

Second, under the circumstances of this case, the appellants do not contest that any compulsory drug test employed by the School System, in order to be lawful, must show a nexus to the employer's safety concern. Here, the School System's legitimate justification for the drug testing program is its concern that employees involved in the transportation of handicapped children not be under the influence of drugs while on duty. The School System made clear that its purpose in ordering the drug testing was to enforce Superintendent's Directive 662.13, which prohibits employees from being "under the influence of . . . drugs . . . while on school premises." The appellants no longer claim that the EMIT test is a valid measure of whether an employee has used or been under the influence of drugs "while on school premises," so the test administered to the appellee is no longer in issue. The only point left to be made in this case—and the appellants do not appear to challenge it—is that any drug test the School System employs in the future must be one that validly detects the activity with which the School System is legitimately concerned.

Medford Congress of Teachers, supra, in which the New York Court of Appeals held that mandatory drug testing of public school *teachers* is unconstitutional. We offer no view on the holding in *Patchogue-Medford* because it raises questions that are beyond the bounds of the issues before us.

CONCLUSION

In summary, then, we hold that it is not unreasonable for the School System to require drug testing of its employees where: (a) the employees' duties have a direct impact on the physical safety of young school children; (b) the testing is conducted as part of a routine, reasonably required, employment-related medical examination; and (c) the test employed is one that has a nexus to the employer's legitimate safety concern.

For these reasons we reverse the District Court's judgment pertaining to "probable cause," and vacate that portion of its injunction from which appeal was taken.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1624

JUANITA M. JONES,
Plaintiff,

v.

FLORETTA DUKES MCKENZIE, *et al.*,
Defendants.

MEMORANDUM

I.

Plaintiff sues the District of Columbia and those responsible for the School System's employee drug-use surveillance program,[1] challenging their decision to discharge her for alleged violation of a directive that required that school personnel refrain from using, possessing or being under the influence of marijuana while on school premises. Plaintiff claims that defendants' actions with respect to her discharge were arbitrary and capricious, violated her rights under the 4th and 5th Amendments and her right to privacy, and constituted violations of applicable Board of Education rules and Superintendent's Directives. She also claims that defendants failed to satisfy the requirements of the District of Columbia Administrative Procedures Act and were negligent in terminating her employment. Plaintiff seeks both injunctive relief and damages under 42 U.S.C. § 1983.

Presently before the Court are defendants' motion to dismiss or, in the alternative, for summary judgment, and plaintiff's motion for partial summary judgment on Counts

[1] Named individually as defendants are Floretta Dukes McKenzie, Superintendent of District of Columbia Public Schools, and William J. Bedford, Director of the Division of Logistical Support, D.C. Public Schools.

I, II, III and V of her complaint. Counsel have filed extensive briefs supplemented by documentary evidence and affidavits, and the matter has been argued.

I.

In 1977, the Superintendent of the District of Columbia Schools issued Directive 662.13 which states in pertinent part:

> [I]t is strictly prohibited for school personnel . . . to possess, use or be under the influence [footnote omitted] of . . . narcotics, [footnote omitted] or other drugs such as LSD, marijuana and the like, while on school premises. Personnel found violating this directive will be subject to suspension and/or termination.

The Directive defined "under the influence" as

> [a]ny abnormal mental or physical condition resulting from indulging in any degree in intoxicating liquors, narcotic drugs or other drugs which tend to deprive one of the clearness of thought and control of himself which he would otherwise possess.

In the summer of 1984 the District of Columbia School System initiated a program of urinalysis testing for the detection of illegal drugs, and the System's Transportation Division implemented the program by requiring over 200 Transportation Division employees to take physical examinations which included urinalysis testing for drugs. Interrogatory Answer 18. The Division initiated the program because of, *inter alia*, a significant increase in traffic accidents and absenteeism, and the discovery of syringes and bloody needles in restrooms frequented by Transportation Division employees. Interrogatory Answer 6.

Before the program began, William C. French, Transportation Officer, had written to his superior, William J. Bedford, that "[a] major problem in this branch is the high percentage of employees that are actually using narcotics

while on duty or reporting to work after using narcotics and having their performance of duty affected accordingly." Letter from William C. French to William J. Bedford at 1 (May 17, 1984). French cited examples. *Id.* at 1-2. He described the difficulty encountered in attempting to use conventional law enforcement techniques to detect and discipline drug users. He emphasized that:

> The responsibility inherited [sic] in the mission of this branch in transporting handicapped students and other students in a safe manner is immeasurable . . .. [I]mmediate action must be taken to drastically reduce or eliminate the narcotic problem.

Id. at 3.

French recommended adaption [sic] of the system used by the Washington Metropolitan Area Transit Authority for "drug or alcohol using employees as well as the screening of new applicants." Whereas WMATA limited physical examinations, including drug screening to employees suspected of using drugs and to new applicants, French recommended that the Division be authorized to require all of its employees to take a physical examination which included drug screening.

On May 24, 1984, French's supervisor, Bedford, forwarded the recommendation to the Associate Superintendent with the affirmation that he was aware of each of the incidents recited by French and could "attest to the fact that some drastic measure must be initiated as quickly as possible . . . prior to the opening of school in September." Letter from William J. Bedford to Dr. James Brown (May 24, 1984).

On June 12, 1984, the Superintendent issued Directive 205.1. It required the "urinalysis testing of all employees who are or will be required to undergo medical examinations to determine physical fitness for licensing and other employment related reasons." The Directive concluded:

> The *confirmed* finding of an illicit narcotic substance in the urine of an employee . . . shall be grounds for termination of that employee . . . . [Emphasis added.]

To test urine samples obtained from Transportation Division employees, defendants used the EMIT Cannabinoid Urine Assay manufactured by Syva Company. The EMIT test detects the presence of metabolites of the psychoactive chemical THC which produces the intoxicating effect associated primarily with marijuana and hashish. Solely Affidavit at 3, Exhibits 9 and 10. The EMIT test does not indicate when the ingredient was absorbed as THC metabolites may be retained in an individual's system for days or weeks. In addition, the test does not indicate with respect to marijuana whether the ingredient was ingested by active use or as a result of passive inhalation in the presence of others who were smoking marijuana. The manufacturer's label, inserted in each package, bears this legend:

> Any positive should be confirmed by an alternative method. Other methods in use for the detection of [delta 9]-THC metabolites include radioimmunoassy (16-18) and gas chromatography-mass spectrometry (19-22).

Soley Affidavit (Sept. 17, 1985), Exhibit 4.

Plaintiff was originally hired in February, 1981, as a "when actually employed" employee (WAE). She served as a school bus attendant and was rehired for the 1981–1982, 1982–1983, and 1983–1984 terms. Her duties were to assist students as they got on and off the buses, particularly handicapped students who require someone to lift them on and off of a bus and to observe and assist them en route to and from school. Except for a hiatus in 1981 when she was terminated in June and reappointed in August, plaintiff worked from 30 to 35 hours each week during the school years and the summers, until August 31, 1984.

In August, 1984, plaintiff submitted to a urinalysis testing

for drugs as part of the Transportation Department's testing program. The first test, effected by computer, gave a positive indication that THC metabolites were present in plaintiff's urine. The test was then repeated manually. It was not otherwise confirmed. Plaintiff, upon being informed of the positive test result, immediately voluntarily underwent two additional urinalysis tests, which came back negative for the presence of THC metabolites in her urine. The Department does not dispute that before requiring plaintiff to take the test, the Department had no particularized suspicion that she had ever used or was under the influence of drugs, either on or off the premises. In fact, defendants failed, in their opposition to plaintiff's motion for partial summary judgment, to traverse plaintiff's representation in her formal statement of material facts that she had never used drugs or marijuana during her period of employment with the District of Columbia. On August 16, 1984, plaintiff's supervisor notified her that she would be discharged on August 31 because the National Health Laboratories reported that a urine specimen taken in the annual physical examination required of plaintiff and all other transportation employees "indicated positive use of drugs" in violation of the Superintendent's Directive 662.13. The drug she was accused of using was marijuana. Interrogatory Answer 30. The defendants concluded that the positive test indicated that plaintiff "had used and was under the influence of marijuana in violation of Directive 662.13." Interrogatory Answer 33. She was thereupon terminated without a hearing. Twenty-seven other Transportation Division employees were also terminated in August and September, 1984, after testing positive for illegal drugs: 23 for marijuana, 2 for marijuana and other drugs, and 2 for PCP. Interrogatory Answer 19.

Plaintiff thereafter appealed her termination and requested a hearing at which she could appear with counsel and testify and present other evidence. Defendants refused this request and permitted only a written submission. In November,

1984, a hearing examiner employed by the Office of the D.C. Superintendent of Schools rejected her appeal.

II.

Plaintiff contends that defendants' termination of her employment violated her constitutional rights as well as rules and regulations of the District of Columbia. Specifically, plaintiff requests a summary judgment that defendants have terminated her without an adequate hearing solely on the basis of one unconfirmed EMIT urinalysis test in violation of her constitutional rights to substantive and procedural due process of law, and subjected her to an unreasonable search and seizure when they conducted a urine test to which she was compelled to submit or lose her job. In addition, plaintiff's pending motion seeks a judgment that her termination without a confirming test by a technique different from EMIT violated directives of the District of Columbia Board of Education and Superintendent of Schools. The complaint also alleges that defendants violated plaintiff's right of privacy and negligently terminated her employment, but she does not seek summary judgment on those claims.

A.

There is a threshold question of whether a "wages as earned" (WAE) employee like plaintiff had a property interest in her job or a liberty interest in her reputation which was protected by the Due Process Clause. Defendants claim that they never intended to create any property interest in WAE employees; they created the category to give managers flexibility in meeting short term personnel needs without a red tape burden. Defendants cite Directive 650.4 issued by the Superintendent on June 7, 1978, which provides that "a temporary employee is not entitled to a hearing [upon termination] but may have [his] written appeal reviewed and a determination rendered in writing by the Superintendent within ten (10) days of receipt of the appeal." *Id.* at 4. Defendants also claim that WAE employees knew their positions were

intermittent and subject to sudden loss, without "cause." Defendants state that they never assumed that a WAE would return for the next school year. Each WAE was requested to advise the employer whether he or she wished to "re-enlist" for another year giving the employer discretion to decide whether to engage the WAE for another year, for a shorter or intermittent period, or not to renew the employment.

However, defendants concede that plaintiff's employment was governed by Board of Education Rules 1401.1 and 1401.2, which permit the termination of an employee only for "cause" without distinguishing between a full time employee and one, like plaintiff, employed in WAE status. Specifically, Rule 1401.1 provides that:

> Adverse action shall be taken for grounds that will promote the efficiency and discipline of the service and *shall not be arbitrary or capricious.* [Emphasis added.]

Rule 1401.2 provides that

> Just cause for adverse action may include:
>
> . . .
>
> (f) Intoxication while on duty;
>
> . . .
>
> (h) Violation of the rules, regulations, or lawful orders of the Board of Education . . . .

These requirements for a termination which is for cause in the sense of not being arbitrary and capricious confers a property interest which cannot be taken by a government employer without due process. *See Cleveland Board of Education v. Loudermill,* 105 S. Ct. 1487 (1985); *Johnson v. United States,* 628 F.2d 187, 194 (D.C. Cir. 1980).

It may well be that Rules 1401.1 and 1401.2 do not extend to every casual temporary employee of the Board of Education. Plaintiff's service to her employer, however, was not transitory. For all practical purposes, she had been employed

steadily for nearly a full forty hour week for several years. Her correspondence with her employer about renewal of her service for each ensuing school year is plainly distinguishable from the offer and acceptance of employment by a new employee. The continuity of her service, when coupled with the language of Rule 1401, establish a protected property interest in her job which cannot be taken by the defendants arbitrarily and capriciously or without an appropriate hearing.

Nor do defendants meet plaintiff's argument that she had a liberty interest which was offended by the termination of her employment for drug abuse. It is beyond argument that discharge of plaintiff on unsupported charges of drug abuse could severely affect her interest in her "good name, reputation, honor or integrity," and it is well established that such a deprivation of her "liberty" or "property" interest in her reputation triggers constitutional procedural due process requirements. *See Paul v. Davis,* 424 U.S. 693, 708-709 (1976), *reh'g. denied,* 425 U.S. 985 (1976); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 573 (1972). While there is no evidence that defendants published their drug abuse finding, it is a reasonable inference that, unless expunged, the rationale for her termination will remain in her file for automatic publication to any prospective employer of plaintiff. *Compare Hester v. Milledgeville,* 598 F. Supp. 1456, 1473 (M.D. Ga. 1984). Moreover, she has been required to file this law suit to protect her rights, thereby involuntarily publicizing the drug charges herself. Accordingly, if defendants' decision to terminate plaintiff was arbitrary and capricious or if she was deprived of an adequate hearing, her status as a WAE should not preclude adjudication or relief.

B.

Plaintiff establishes that the EMIT test was the sole basis for defendants' decision to terminate her employment. Moreover, it is undisputed that defendants failed to confirm the positive EMIT test report despite the manufacturer's clear

label warning that "positive results should be confirmed by an alternate method," *(see* Solely Affidavit, Exhibit 9) as well as the Superintendent's express directive that a "*confirmed* finding of an illicit narcotic substance" is the approved basis for terminating an employee for drug abuse.[2]

Defendants claim that the positive EMIT test was confirmed in the sense that when the initial automated process was positive, the same test was repeated manually. But this is not confirmation as that term is used in either the Superintendent's directive or the manufacturer's label. The latter identifies alternate confirming tests to include gas chromatography. In addition to the manufacturer's warning that an alternative test should be administered, documents produced by defendants in response to plaintiff's discovery requests are instructive:

A June 8, 1983 report by the Food and Drug Administration to several government agencies reviewing the EMIT test stated that "it is important to remind users of this screen-

[2] In addition, defendants do not dispute with material facts or reasonable inferences plaintiff's contention that even if the positive EMIT test evidenced some exposure to marijuana at some time, it does not evidence either use or being under the influence while on school premises in violation of Directive 662.13. For defendants have formally admitted that the EMIT test does not show whether the subject is using, in possession of, or under the influence of drugs at the time the test is administered. See Admissions No. 15, 16 and 17; Plaintiff's Statement Of Material Facts As to Which There Is No Genuine Issue 31, 32 and 33. Defendants failed to respond to plaintiff's Statement of Material Facts with their own statement of genuine issues as required by Local Rule 1-9(i) and thus are deemed to have admitted them.

In the circumstances of this case, involving failure to confirm a positive EMIT test result by alternative means, it is unnecessary to reach the question of whether it would be arbitrary and capricious for defendants to conclude from the *confirmed* presence of THC metabolites in the urine of an employee on the school premises that the subject employee has an "abnormal . . . physical condition [presence of THC metabolites] resulting from indulging in any degree in . . . narcotic drugs or other drugs which tend to deprive one of clearness of thought and control of himself which he would otherwise possess," and thus, by definition, is "under the influence of . . . marijuana . . . while on school premises" in violation of Directive 662.13.

ing test that any positive result (as stated in the package insert) should be confirmed by an alternative method." Plaintiff's Statement of Material Facts No. 51.

A February 18, 1983 letter published by three toxicologists in the *Journal of the American Medical Association* states that "adequate alternative confirmatory tests must be used" in urine tests for marijuana use. *Id.* No. 50.

A scientific advisory written by the United States Center for Disease Control and published by the Public Health Service of the Department of Health and Human Services on September 16, 1983, stated that "[a]ll urine samples positive by the cannabinoid assay need to be confirmed by an alternate method that is as sensitive as the screening test" *Id.*, No. 49.

A scientific study of the EMIT test by the United States Air Force School Of Aerospace Medicine requires that all positive results be confirmed by gas liquid chromatography before being reported to local commanders or released to the Air Force. *Id.*, No. 48.

Additional corroboration of the need for confirmation appears in the numerous decisions by state and federal courts around the country, including the opinion of an arbitrator in the District of Columbia, that a single, unconfirmed positive EMIT test is not a rational basis for disciplining the subject of the test. *In the Matter of Arbitration between American Federation of State, County and Municipal Employees, District Council 20, Local 2093, AFL-CIO and the Board of Education of the District of Columbia,* AAA Case No. 1639 0030 85H (Dec. 3, 1985); *see also Anable. v. Ford,* No. 84-6033, slip op. (W.D. Ark. July 12, 1985); *Higgs v. Wilson,* No. 83-0256P(J), slip op. (N.D. Ky. Feb. 22, 1985); *Johnson v. Walton,* No. S61-84R, slip op. (Vt. Super. Ct. Feb. 14, 1984). Moreover, numerous court decisions have further established as a matter of court usage that confirmation is not effected by a manual rerun of an automated EMIT test. *See, e.g., Crowell v. Wilkinson,* No. 82-1283, slip op. (M.D.

Pa. Oct. 12, 1983). *Compare Peranzo v. Coughlin*, 608 F. Supp. 1504, 1507, 1514 and n.16 (S.D. N.Y. 1985).

The consequence of defendants' failure to confirm the positive EMIT test is not cured by their argument that even if the test failed to show actual use or effect on school premises, "it did show that plaintiff was using an illegal substance which is certainly detrimental to the school system." Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment at 4.[3] The School System's rules clearly prohibit detrimental conduct on or off school premises that may affect one's work performance. Even if the off duty use of drugs by Board of Education employees was proscribed with sufficient clarity to authorize termination of a user for conduct detrimental to the Board, that is not the authority invoked by defendants when they terminated plaintiff. Nor is an unconfirmed EMIT test any better proof of such conduct than it is of use or acting under the influence on school premises. *But see* note 2 *supra*.

On the basis of the undisputed facts and these persuasive authorities, plaintiff is entitled to a summary judgment that her termination on the basis of a single unconfirmed EMIT test was arbitrary and capricious. Her termination thus violated the requirements of the Board of Education and the Superintendent that precluded arbitrary and capricious termination. Since the arbitrary and capricous termination on the basis of an unconfirmed EMIT test so clearly violated District of Columbia law, it is unnecessary and inappropriate to address the question of whether plaintiff's termination violated substantive due process protections incorporated in the United States Constitution. *See Ashwander v. Ten-*

[3]This is an apparent reference to section 322.3 of Board of Education Rules concerning employee conduct generally. It provides:

> Personal behavior of an employee during non-duty hours is the employee's concern, but this shall not preclude the Superintendent of Schools from taking action against an employee in circumstances where such conduct is detrimental to the Board of Education.

nessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Siler v. Louisville & Nashville RR Co.*, 213 U.S. 175, 193 (1909). The conclusion that termination of plaintiff's employment on the basis of an unconfirmed EMIT test was arbitrary and capricious means, at least, that before defendants can terminate plaintiff again on grounds of drug abuse, they must confirm a positive EMIT test result by an alternative process such as the two suggested by the manufacturer. An accompanying order will impose that requirement.

C.

The question remains whether additional procedural due process was required beyond the opportunity afforded plaintiff and her counsel to make a written submission in the form of an appeal after she was terminated. The Supreme Court has recently reiterated that a deprivation of property by terminating employment must be "preceded by notice and opportunity for hearing appropriate to the nature of the case." *Loudermill, supra*, 105 S. Ct. at 1493, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In this case plaintiff had no hearing before she was terminated and her post-discharge hearing was limited to a written submission, albeit in this case a comprehensive one prepared for her by first-class lawyers. It is enough to establish her procedural due process claim that plaintiff was afforded no hearing before she was discharged. This deprivation violated her constitutional right to procedural due process and affords a second ground for a decision in her favor.

It is neither necessary nor appropriate for the Court to prescribe the form of pre-termination hearing which would pass muster as appropriate to the circumstances. Suffice it to say that the literature furnished by plaintiff, primarily from defendants' files, suggests at a minimum that before plaintiff can be discharged on account of a urine test positive for drugs, some adversary process is in order to determine

that (1) she is, in fact, the subject of the particular positive test, and (2) that the positive test has been appropriately confirmed.

Recognizing the public's vital interest in the safety of school children, the necessity for a hearing before termination need not preclude temporary reassignment, or even suspension, pending confirmation of a positive EMIT test and a hearing. Such reassignment or suspension is not precluded provided that the hearing is held and the issue resolved promptly, and, if plaintiff survives the confirmation test and the hearing, she is fairly compensated for any loss incurred on account of the reassignment or suspension.

V.

There remains for consideration plaintiff's claim that subjecting her to urinalysis without probable cause or any individualized consideration, *en masse* with approximately 200 Transportation Department employees was an unreasonable search in violation of the Fourth Amendment. Defendants sought no warrant authorizing them to require plaintiff to furnish a urine specimen or to authorize defendants to have such a specimen examined for drugs. Nor does it appear that they had probable cause for doing so. Defendants concede that they had no particularized reason to believe that plaintiff used, possessed or was under the influence of drugs.

Defendants point, however, to the obvious and special public danger if their personnel who operate and assist in the operation of school buses are under the influence of drugs. They justify their taking and examining urine specimens of all Transportation Department employees on a significant increase in traffic accidents, an increase in absenteeism, several incidents of erratic and abnormal behavior of some Department employees and the discovery of syringes and bloody needles in Transportation Department restrooms. Moreover, defendants claim that an effort to identify drug users by more conventional police methods, e.g., insinuation

of an undercover officer into the workplace, was unsuccessful. They emphasize that the testing was done in a discrete manner in health clinics or hospitals where the specimens are given in private.

Thus, while defendants admit that plaintiff was an exemplary employee and that they had no particular reason to believe or suspect that she was one of the Department employees who was using drugs, they claim that there was no feasible way to pinpoint drug users except by testing them all. *Compare Hohri v. United States*, No. 84-4560, slip op. (D.C. Cir. Jan. 21, 1986). Furthermore, defendants argue that it is not only appropriate, but necessary, to require a periodic physical examination of personnel responsible for bus operation, that urinalysis is an appropriate incident of a physical examination, and that, in this context, examination of a urine specimen for its drug content involves minimal intrusion on privacy and is quite reasonable in every sense.

Defendants point to precedent authorizing drug screening of all personnel in the armed forces, *Committee for G.I. Rights v. Calloway*, 518 F.2d 466 (D.C., Cir. 1975); prisoners, *see, e.g., Storms v. Coughlin*, 600 F. Supp. 127 (S.D. N.Y. 1984); and city employees engaged in extremely hazardous electrical work where one employee's drug abuse could endanger the safety of fellow employees and the public. *See Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985). Defendants also cite a case indicating that bus drivers have no reasonable expectation of privacy which precludes subjecting them to blood and urine tests for detection of liquor or drug abuse after they have been involved in serious accidents or were suspected of narcotics use. *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976). This Circuit has also condoned a mass search for illegal aliens despite the risk of intrusion on innocent bystanders. *See Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 940 (1982).

Plaintiff counters by pointing out that even the Metropolitan Police Department requires urinalysis only upon reasonable suspicion of use of drugs or at the particularized direction of a member of the Board of Police and Fire Surgeons. *See Turner v. Fraternal Order of Police,* slip op. at 2-3 (D.C. Ct. App. Nov. 13, 1985). City employees in Georgia who were handling high voltage electricity were only subjected to urine testing after an undercover officer observed each individual tested to be smoking what appeared to the officer to be marihuana. *Allen, supra,* 601 F. Supp. at 484. Moreover, even the decision approving mandatory testing of bus drivers in Illinois applied only to those who had been involved in serious accidents or "suspected of being under the influence while on duty." *Division 241, supra,* 538 F.2d at 1266, 1267.

There is strong authority for the proposition that taking a person's urine and testing it for drugs is a search. *Division 241, supra; Allen, supra; Turner, supra.*[4] The ultimate question here is whether plaintiff, serving as a bus attendant assisting students, particularly handicapped ones in traveling by bus to and from school had a reasonable expectation of privacy from a search by mandatory urine testing for drugs and whether any such expectation is outweighed by public safety considerations. School bus drivers or mechanics directly responsible for the operation and maintenance of school buses might reasonably expect to be subject to urine and blood tests not required of other bus drivers without particularized suspicion. *Compare Division 241, supra.* While the question is not free from doubt, particularly in light of *Blackie's, supra,* it does not follow that a school bus *attendant* like plaintiff should have expected

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[4] *But see* Judge Nebeker's concurring opinion in *Turner* questioning whether Fourth Amendment concerns are even implicated in urine testing cases.

to be exposed to such testing or that public safety considerations require testing of a school bus attendant like plaintiff equivalent to that imposed by the military and more stringent than that so far found permissible for the police or for bus drivers in the absence of particularized probable cause. Accordingly, plaintiff's motion for a summary judgment that testing of her violated rights guaranteed by the Fourth Amendment must be granted.

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER
United States District Judge

Dated: FEBRUARY 24, 1986

[Filed: FEBRUARY 25, 1986]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1624

JUANITA M. JONES,
Plaintiff,

v.

FLORETTA DUKES MCKENZIE, *et al.*,
Defendants.

ORDER

For reasons stated in an accompanying Memorandum, it is this 24th day of February, 1986, hereby

ORDERED and ADJUDGED: that defendants' Motion for Summary Judgment is DENIED; and it is further

ORDERED, ADJUDGED and DECREED:

1. That plaintiff's Motion for Partial Summary Judgment is GRANTED as to Counts II, III and V;

2. That the defendants immediately reinstate plaintiff's employment with full backpay, seniority, and benefits;

3. That the defendants expunge from all of plaintiff's records within the District of Columbia Public School System any mention of the termination of her employment;

4. That the defendants may not administer any urinalysis test for drug use to plaintiff without first establishing probable cause to believe that she is using or under the influence of illicit drugs based on specific objective facts;

5. That the defendants may not terminate plaintiff's employment on the basis of the EMIT test without adequate confirmation by means of an alternative testing technique;

6. That the defendants must give plaintiff meaningful notice and an opportunity to be heard prior to termination; and

7. That the defendants must provide plaintiff the right to a hearing after termination, including, at a minimum, the right to appear in person with counsel and to present evidence; and it is further

ORDERED: that a status conference will be held on March 13, 1986, at 9:30 A.M. in Courtroom No. 3, to schedule further administration of this case.

/s/ Louis F. Oberdorfer

LOUIS F. OBERDORFER
United States District Judge

[Filed: FEBRUARY 25, 1986]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1987

CIVIL ACTION No. 85-01624

No. 86-5198

JUANITA M. JONES

v.

FLORETTA DUKES MCKENZIE,
SUPERINTENDENT OF SCHOOLS, ET AL.
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: EDWARDS, STARR and D.H. GINSBURG, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby reversed in part and vacated in part, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: November 17, 1987
Opinion for the Court filed by Circuit Judge Edwards.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1987

CIVIL ACTION NO. 85-01624

No. 86-5198

JUANITA M. JONES

v.

FLORETTA DUKES MCKENZIE,
SUPERINTENDENT OF SCHOOLS, ET AL.
Appellants

Before: EDWARDS, STARR and D.H. GINSBURG, *Circuit Judges.*

ORDER

Upon consideration of appellee's petition for reconsideration, filed December 16, 1987, it is

ORDERED, by this Court, that the petition is denied.

Per Curiam
For The Court

CONSTANCE L. DUPRE,
Clerk

/s/ By: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5198

JUANITA M. JONES
Appellee,

v.

FLORETTA DUKES MCKENZIE,
Appellants.

Friday, October 2, 1987

Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice, at 9:30 a.m.

BEFORE:
Circuit Judges EDWARDS, STARR and D. H. GINSBURG.

APPEARANCES:

CHARLES L. REISCHEL, ESQ., Deputy Corporation Counsel, District of Columbia, District Building, 14th and Pennsylvania Avenue, N.W., Washington, D.C. 20004; on behalf of Appellants

DAVID A. SOLEY, ESQ., David & Hagner, 1120 Nineteenth Street, N.W., Washington, D.C. 20036; on behalf of Appellee

* * *

QUESTION: Let me just ask a question. It matters, right, there has to be a nexus? The urinalysis is supposed to support your goal as stated in your rule?

MR. REISCHEL: That's right.

QUESTION: Your rule says to prohibit possession, use or being under the influence of drugs while on school premises. The record is clear that the emit test does not indicate when ingestion takes place, over what time period, it does not prove, doesn't even purport to show present influence. The test in no way, as far as I can tell, seeks to show what your rule prohibits, and if there is a nexus requirement, I don't know why we go even further.

MR. REISCHEL: Well, we relied down below on that rule that is on the job use, and we also relied on conduct [detrimental] to the school system. In any event, Your Honor, we did have plenty of proof that ——

QUESTION: What does that mean? What does that mean conduct [detrimental] to the school system? I thought it was the rule and I thought this case was about the enforcement of that rule, which is very clear, on the premises, possession, use, under the influence of drugs or alcohol on school premises ——

MR. REISCHEL: No, the case ——

QUESTION: —— and everyone concedes that the emit test does not prove or disprove anything with respect to that question.

MR. REISCHEL: The case is about whether or not we can require our employees that are directly concerned with the transportation of school children to be drug free. That is what the case is about. We have not only this rule, we have another rule ——

QUESTION: That is not what the case is about.

MR. REISCHEL: In our view, that is what the case is about.

QUESTION: Well, the case is clearly about whether you can require a urinalysis, because we have said, the law of the Circuit is, that that is a search and you are in the public sector, you have to show something thereafter, whether or not it is reasonable.

One of the things I think you have to consider to determine whether or not it is reasonable is whether or not that search will produce something that will support the rule that you are seeking to enforce, which presumably is okay. We now have found out that there is no clear relationship between the test that you use and the rule that you seek to enforce.

MR. REISCHEL: There is a clear relationship between having drug-using employees and having drug use on the job. We proved we had drug use on the job and we are trying to get rid of drug-using employees.

QUESTION: That is not the question I asked. Come on, you are too intelligent for that. That is not my question. Of course we all want drug-free schools, but that isn't the question. The question is whether what you have done will reach that result.

MR. REISCHEL: It has helped a lot to reach that result, Your Honor.

QUESTION: I am not talking about whether or not you threaten people and scare them to death, whether that has an impact. I am talking about whether or not the emit test will enforce the rule, because it will find for you what you prohibit, and the record indicates it doesn't, it doesn't even purport to.

MR. REISCHEL: What it did is it got rid of a lot of people who were drug users and we stopped having a drug culture amongst the transportation branch employees.

QUESTION: If you took people into a room and threatened to beat them to death, you might get rid of some drug use, too. That is not the point.

QUESTION: Mr. Reischel, does the District appeal the portion of the injunction that prohibits terminating an employee on the basis of the emit test?

MR. REISCHEL: No, we did not. We only ——

QUESTION: Are you prepared to use the emit test, if at all, only as being preliminary to some sort of adverse actions on employees?

MR. REISCHEL: That's correct, Your Honor.

QUESTION: This test is just used, if it is used at all, to create a basis for doing a confirming test which would then be the ——

MR. REISCHEL: That's right, we filed down below ——

QUESTION: If you use a confirming test, does it tend to show anything more than drug use in the distant past, with greater reliability?

MR. REISCHEL: It will not show necessarily that the drugs were used on the job, which was the question. It will show much more accurately ——

QUESTION: Is there any test which shows that a person who has drug residue in their blood stream or urine used the drugs while on the job?

MR. REISCHEL: Not to my knowledge.

QUESTION: It would be pretty hard, wouldn't it, since the body clock doesn't clock it out?

MR. REISCHEL: Well, Your Honor, You are absolutely correct, we only appealed the prohibition against using any drug test. We filed in the record below a directive by the Superintendent that says we're going to use confirmatory tests before we take personnel action.

QUESTION: Now, when you do use a confirmatory test and get a second positive result, is that the basis then for discharge, or is that simply the basis for putting someone out of a sensitive position, into a different type of position?

MR. REISCHEL: It could be discharge, and I think it normally is.

QUESTION: If that is discharge, then how is that justified on the basis of showing drug use on the job?

MR. REISCHEL: We are basing our defense of this program on the grounds that where we have a demonstrated on-the-job problem, we can get rid of drug abusers. Anybody who is using illicit drugs is by definition a drug abuser.

* * *

QUESTION: Well, let's finish it. Does it matter to you whether or not there is any job impairment, it is whether you find any traces?

MR. REISCHEL: It matters to us in the circumstances here whether there has been illegal drug use, because we have got an illegal drug use problem on the job and we don't know who is causing it. But it is a logical inference that drug users are causing it, drug users of illicit drugs, which is what we are dealing with here, are using it illegally. The people who were caught here, I might add, are drug users who couldn't even answer a warning, "refrain from use long enough to avoid detection." They are people whose judgment with respect to drug use is very questionable.

QUESTION: Don't overstate your case.

* * *

QUESTION: Now, as I understand the recent colloquy, you are setting yourself up so that, even if you prevail in this case, in the next case when someone is discharged on the basis of the confirming test, there will be an open question as to whether that confirming test showed anything that bore on their ability to perform the job, let alone whether they ingested the substance while on the job.

MR. REISCHEL: Yes, our position is that where we have a proven drug problem, we can get rid of drug users that we find, because in these circumstances it is such a severe risk to the public safety.

* * *

QUESTION: There is another case lurking in the future here, as the District has conceded, over whether the procedures that they may use under the terms of the injunction, even if parts of it were relaxed, would still be challengable for the reasons that you are advancing now, but that is not this case.

MR. SOLEY: No, Your Honor. If I understand your point correctly, the answer would be that all urinalysis testing for drugs, there is no urinalysis test that can show whether a person is impaired by drugs, because of the scientific nature of the urinalysis test. It does not test whether there [are] active ingredients of drugs in your system. It indicates whether there are metabolites, the active ingredients of perhaps THC that break down in your body, the metabolites go into your urine system. Those metabolites can never —— by never, I understand technology is moving forward, but we are nowhere close to this point yet —— metabolites of a drug in your urine can never indicate whether a person is impaired by drugs, using, possessing or impaired by drugs.

QUESTION: When that case comes up, there will be a question of whether it is a reasonable inference that can be drawn without individual circumstances, but I don't see how in the record you have produced here that issue is presented. I mean if that were correct, why would probable cause be a foundation for administering the test?

MR. SOLEY: Your Honor ——

QUESTION: Probable cause to believe the person has ingested would again be related to any action that could be taken against him, is that correct?

MR. SOLEY: In that test, Your Honor, you are correct, in that perhaps urinalysis testing should be unconstitutional across the board, even with or without probable cause.

QUESTION: That is the argument you are leading to.

* * *

FILED
MAY 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1706 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FLORETTA DUKES MCKENZIE,
SUPERINTENDENT OF SCHOOLS, *et al.*,
Petitioners,

v.

JUANITA M. JONES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1706

FLORETTA DUKES MCKENZIE,
SUPERINTENDENT OF SCHOOLS, *et al.*,
Petitioners,

v.

JUANITA M. JONES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Juanita M. Jones respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the District of Columbia Circuit's opinion in this case. That opinion is reported at 833 F.2d 335 (1987).

STATEMENT OF THE CASE

Petitioners Floretta Dukes McKenzie, William J. Bedford, and the District of Columbia (the "School System") have asked this Court to review a decision of the United States Court of Appeals for the District of Columbia Circuit which prohibits the School System from administering a urinalysis test for illicit drugs upon Juanita

Jones unless, among other things, the urine test is capable of showing current drug impairment. The court's decision to limit drug testing to tests capable of detecting current impairment, however, is based on several factual admissions made by the School System, is sustainable on non-constitutional grounds and, accordingly, is not appropriate for review by this Court.

Specifically, the Court of Appeals' decision was based upon the following admissions by the School System: (1) that the only governmental interest relied upon by the School System in implementing the drug testing program was the prohibition of drug use or impairment on the job; (2) that there must be a nexus between the governmental interest and the testing performed; and yet (3) that the urine test administered by the School System upon Ms. Jones was incapable of detecting on-duty drug use. The School System now claims, for the first time in this case, that there is a reasonable connection between off-duty drug use and on the job impairment. The School System's argument, which is contrary to its judicial admissions and which is without any support in the record, is not a sufficient reason for the granting of a petition for writ of certiorari.

The record below establishes that Juanita Jones, a fifty-two year old grandmother of four, is a dedicated and model employee of the District of Columbia Public School System, and is not a user of drugs. *See Jones v. McKenzie*, 628 F. Supp. 1500, 1503 (D.D.C. 1986) (Petition for Writ of Certiorari Appendix ("Pet. App.") 18a); Interrogatory Answer No. 6 (Respondent's Supplemental Record Excerpts, filed with the Court of Appeals ("S.R.E.") 15, 20). Despite Ms. Jones' excellent work record, the School System, without any reason to believe that Ms. Jones used, possessed, or was under the influence of illegal drugs at any time, subjected her and hundreds of other employees of the School System's Transportation Branch to urinalysis testing for drug use

in the Summer of 1984. *Jones*, 628 F. Supp. at 1503, 1507 (Pet. App. 15a, 26a); Admission No. 8 (S.R.E. 15, 20). On the basis of a drug test result which erroneously indicated past use of marijuana, Ms. Jones was fired summarily from her employment as a school bus attendant and wrongfully branded as a drug user. *Jones*, 628 F. Supp. at 1503, 1505-06 (Pet. App. 18a, 21a-22a, 24a-25a).

Superintendent's Directive 205.1, which formally implemented the drug testing program, permits drug tests to be administered upon all Transportation Branch employees who undergo medical examinations or who, at the broad discretion of the Superintendent of Schools, display behavior deemed to be a "threat" or "detrimental" to the School System:

> Superintendent's Directive 662.13 prohibits the possession of, use of, or being under the influence of intoxicating liquors, narcotics or controlled substances by School System employees *while on duty*. The Directive provides that personnel found violating this Directive will be subject to termination and/or suspension. The Directive remains in full force and effect.
>
> In keeping with this long standing policy against the use of illicit narcotic drugs and controlled substances by employees of the D.C. Public School System *while on duty*, or being under the influence of such substances, I have instructed the appropriate staff to initiate forthwith testing procedures to insure compliance with this policy. This procedure will consist of urinalysis testing of all employees who are or will be required to undergo medical examinations to determine physical fitness for licensing and other employment-related reasons. Additionally, . . . any employee who displays behavior or actions which can be construed as a threat to the safety or well being of the students, staff, or public or are detrimental to the effective functioning of pro-

> grams and activities of the D.C. Public Schools may be directed for testing. . . .

Superintendent's Directive 205.1 (Petitioners' Record Excerpts, filed with the Court of Appeals, 39-40) (emphasis added).

It is significant that Superintendent's Directive 205.1, by its own terms, implements an earlier Superintendent's Directive which prohibits the use, possession, or being under the influence of illegal drugs on school premises. Superintendent's Directive 662.13 (S.R.E. 87). Despite the express language of both Superintendent's Directives in prohibiting only *on the job* drug use, however, the School System has admitted that the drug test administered to Ms. Jones was incapable of determining whether she used or was under the influence of drugs while on duty. *Jones*, 628 F. Supp. at 1503 n.2 (Pet. App. 22a).

Based on these facts, and other facts admitted by the School System, the District Court, upon Ms. Jones' Motion for Partial Summary Judgment, granted her requests for declaratory and injunctive relief, and ordered Ms. Jones' immediate reinstatement, with full back pay. The Court determined, among other things, that the School System "may not administer any urinalysis test for drug use to [Ms. Jones] without first establishing probable cause to believe that she is using or under the influence of illicit drugs based on specific objective facts." Order, dated February 25, 1986 (Pet. App. 30a). Although the District Court's Order applied to all testing—both as part of and outside of the context of a medical examination—the School System, in its appeal, subsequently abandoned any challenge to testing outside the context of a physical, and chose to focus its arguments on whether it could test for drugs as part of an annual medical examination. *Jones v. McKenzie*, 833 F.2d 335, 339 (D.C. Cir. 1987) (Pet. App. 9a).

Limiting its holding to the narrow scope of the issue appealed by the School System, the Court of Appeals ruled that the analysis for drug use of a urine sample obtained pursuant to a routine medical examination constitutes a "search" under the Fourth Amendment. *Id.* at 338 (Pet. App. 7a-8a). The Court of Appeals, however, held that drug testing was "reasonable" under the Fourth Amendment provided that (1) the School System only tested employees whose duties have a direct impact upon safety; (2) testing is conducted as part of a routine employment-related medical examination; and (3) the test employed has a nexus to the employer's legitimate safety concern. *Id.* at 341 (Pet. App. 13a).

The Court of Appeals further ruled that the nexus requirement necessitated, in the instant action, that the School System use only a drug test capable of detecting on-the-job impairment. *Id.* (Pet. App. 12a-13a). The court reached this result after noting the following admissions by the School System: (1) that a compulsory drug test, in order to be lawful, must show a nexus to the employer's legitimate safety concern; (2) that the legitimate concern of the School System, under its regulations, was to prohibit employees involved in the transportation of handicapped children from being under the influence of drugs while on duty; and (3) that the test administered upon Ms. Jones could not detect whether an employee was using, in possession of, or under the influence of illicit drugs at the time of the test. *Id.* at 339-41 (Pet. App. 9a-12a). Accordingly, the Court of Appeals held that the School System could only administer a drug test capable of detecting current drug impairment. *Id.* at 339, 341 (Pet. App. 9a, 12a).

REASONS FOR DENYING THE WRIT

The constitutionality of urinalysis testing for illicit drugs is an issue of great public concern, as the Court has recognized in granting certiorari in *National Treas-*

ury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988) (No. 86-1879). The present case, however, is not worthy of the Court's attention because the narrow issue presented by the Petitioners—whether the School System can administer drug tests upon certain individuals as part of a medical examination—can be sustained on non-constitutional grounds, without reaching the broad constitutional question posed by random drug testing of government employees.

The present case is further unworthy of the Court's attention because the court below clearly did not err in concluding that the School System was required to use a test which is capable of indicating whether an employee uses, possesses, or is under the influence of illegal drugs. The correctness of the court's decision is self-evident in light of the School System's admissions that its sole purpose in implementing the drug testing program was to prohibit drug use and impairment *on the job*, that there must be a nexus between this interest and the testing performed, and that the test used was incapable of satisfying the government's interest.

Specifically, the School System, in its Petition for Writ of Certiorari, does not dispute the Court of Appeals' fundamental holding that any test employed as part of its drug testing program must be one that has a "nexus" to the School System's legitimate safety concern. Indeed, the School System readily admitted at the oral argument before the Court of Appeals that there must be a nexus between the urinalysis test and the government objective in administering the test (Pet. App. at 34a). Now, however, the School System contends that the "nexus" is established through a purported relationship between off-duty use and impairment on the job. Its belated attempt to argue for a "prophylactic rule" which, by its own terms, is overly broad and not narrowly tailored to achieve the School System's legitimate purposes, is con-

trary to the School System's judicial admissions and unsupported by the record.

It was undisputed in the court below that the School System's sole justification for urinalysis testing for drugs was Superintendent's Directive 662.13, which prohibits use, possession, or being under the influence of illicit drugs while on school premises. *Jones*, 833 F.2d at 337, 341 (Pet. App. 4a, 12a). The School System made no attempt to assert any other interest in the District Court, including the "prophylactic rule" which it now claims as justification for its urinalysis testing program. The School System also admitted that the EMIT test, and similar tests which do not measure whether an employee uses, possesses, or is under the influence of drugs while on school premises, are incapable of detecting the activity with which the School System legitimately is concerned. *Id.* at 339, 339 n.10 (Pet. App. 19a); Oral Argument (Pet. App. 37a). Thus, the Court of Appeals properly held that the School System could no longer use the EMIT test or other tests incapable of measuring current impairment. *Id.* at 339, 341 (Pet. App. 9a, 12a).

The School System's "prophylactic rule" is also unsupported by any evidence in the record. There was not one shred of evidence presented by the School System in the record to support its belated argument that there is a nexus between off-duty drug use and on-duty impairment. Indeed, the District Court found that it is possible for a non-drug user to test "positive" for drugs due to "passive inhalation." *Jones*, 628 F. Supp. at 1503 (Pet. App. 17a). Therefore, there is no necessary correlation between off-duty drug use and positive test results. In the absence of any competent evidence, there is no basis for this Court or the Court of Appeals to justify future testing under the School System's "prophylactic rule" based on speculation concerning the relationship between off-duty use and job performance. *See United Paperworkers International Union v. Misco, Inc.*, 108 S.Ct. 364, 374

(1987) (no necessary connection between possessing a marijuana cigarette in a parking lot and using drugs while on the job).

Thus, even without reaching the constitutional questions presented, the Court of Appeals was clearly correct in concluding that based on the record before it, which included the express language of the School System's regulations and its own admissions, the School System could not test Ms. Jones unless the test used is capable of measuring current impairment. Accordingly, the Court of Appeals' decision is sustainable on non-constitutional grounds and is not appropriate for review by this Court.

CONCLUSION

For these reasons, the School System's Petition for Writ of Certiorari should be denied.

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No. 87-1706

In the Supreme Court of the United States

OCTOBER TERM, 1987

FLORETTA DUKES MCKENZIE, SUPERINTENDENT OF SCHOOLS, ET AL., PETITIONERS

v.

JUANITA M. JONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in the absence of particularized suspicion, a public employer is prohibited under the Fourth Amendment from administering a drug test to employees, on the ground that the test cannot accurately determine whether the employee was under the influence of drugs while on duty.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The question presented in this case is whether, under the Fourth Amendment, a public employer may administer a drug test to its employees, in the absence of particularized suspicion of drug use, where the test is incapable of determining whether or not an employee was under the influence of drugs while on duty. The United States has a compelling interest in the disposition of that question. As a general matter, pursuant to Exec. Order No. 12,564, 3 C.F.R. 224 (1987), all federal agencies are required to establish programs for the drug testing of employees in sensitive positions. Congress has also enacted legislation establishing additional requirements for federal drug-testing programs (Act of July 11, 1987, Pub. L. No. 100-71, § 503, 101 Stat. 468-471) and, in compliance

therewith, HHS has recently issued Guidelines establishing procedures for federal employee drug testing. 53 Fed. Reg. 11970 (1988). More specifically, the United States has petitioned for a writ of certiorari in *Burnley* v. *Railway Labor Executives' Ass'n*, No. 87-1555, a case raising issues substantially similar to the present one. Because of its interest in the issue, the United States filed a brief in this case in the court of appeals in support of petitioners. For the reasons stated below, however, we believe that the *Burnley* case is a more appropriate vehicle than the present case for the resolution of the question presented in the petition.

STATEMENT

1. In 1977, the Superintendent of the District of Columbia Schools issued Directive 662.13, which states in pertinent part (Pet. App. 15a):

> [I]t is strictly prohibited for school personnel * * * to possess, use or be under the influence * * * of * * * narcotics, * * * or other drugs such as LSD, marijuana and the like, while on school premises. Personnel found violating this directive will be subject to suspension and/or termination.

In the summer of 1984, the District of Columbia School System initiated a program of urinalysis testing for the detection of illegal drugs, and the System's Transportation Division implemented that program by requiring over 200 Transportation Division employees to take physical examinations that included urinalysis testing for drugs. The Division initiated the program after discerning a significant increase in traffic accidents and absenteeism and discovering syringes and bloody needles in restrooms frequented by Transportation Division employees. In a directive issued on June 12, 1984, the Superintendent advised that "[t]he confirmed finding of an illicit narcotic sub-

stance in the urine of an employee * * * shall be grounds for termination of that employee." Pet. App. 15a, 17a.

To test the urine samples, the Transportation Division used the EMIT Cannabinoid Urine Assay, a test that detects the presence of metabolites of the psychoactive chemical THC, which produces the intoxicating effect associated with marijuana and hashish. The EMIT test does not indicate, however, when the ingredient was absorbed, in that THC metabolites may be retained in an individual's system for days or even weeks. Pet. App. 17a.

2. Respondent was hired by the Transportation Division in 1981 as a school bus attendant. In that capacity, she was responsible for assisting handicapped children on and off the bus. In some cases, this required physically carrying the child. Respondent was also responsible for ensuring that the children were properly seated and orderly during the sometimes lengthy bus trips. Pet. App. 5a.

Together with other Transportation Division employees, respondent underwent a physical examination and urine test in the summer of 1984. Her test was positive for THC metabolites, indicating marijuana use. Upon learning of respondent's test result, petitioners terminated her employment. Pet. App. 5a-6a.

3. Respondent thereafter commenced this action in the United States District Court for the District of Columbia. On February 24, 1986, the district court granted summary judgment in respondent's favor (Pet. App. 14a-29a). The court first held (*id.* at 19a-25a) that respondent had a protectible property interest in her job and a liberty interest in her reputation, and that terminating her employment on the basis of a single unconfirmed EMIT test was arbitrary and capricious. The court next found (*id.* at 25a-26a) that petitioners had violated respondent's procedural due process rights by discharging her without first affording her "some adversary process * * * in order to determine that

(1) she is, in fact, the subject of the particular positive test, and (2) that the positive test has been appropriately confirmed." Finally, the court held (*id.* at 26a-29a) that, under the Fourth Amendment, petitioners were prohibited from administering any drug test to respondent in the absence of individualized suspicion of drug use. In so holding, the court acknowledged (*id.* at 28a) that "[s]chool bus drivers or mechanics directly responsible for the operation and maintenance of school buses might reasonably expect to be subject to urine and blood tests not required of other bus drivers without particularized suspicion." The court held, however, that "it does not follow that a school bus *attendant* like [respondent] should have expected to be exposed to such testing or that public safety considerations require testing of a school bus attendant like [respondent] * * * in the absence of particularized probable cause" (*id.* at 28a-29a (emphasis in original)).

4. Petitioners appealed only the district court's holding that the Fourth Amendment flatly prohibits drug testing of bus attendants in the absence of "particularized probable cause" (Pet. App. 6a-7a). On November 17, 1987, the court of appeals reversed and vacated "that portion of [the district court's] injunction from which appeal was taken" (*id.* at 13a). The court first found (*id.* at 7a-8a) that mandatory urinalysis of public employees is a "search" within the meaning of the Fourth Amendment. Turning next to the question whether the search was "reasonable," the court took pains "to make clear the narrow focus of [its] inquiry" (*id.* at 8a-9a). In particular, the court noted (*id.* at 9a (emphasis in original)), "[t]he only issue in this case is the propriety of the District Court's blanket injunction prohibiting *any* drug testing in the absence of probable cause." The court explained (*ibid.*) that the case did not present the question whether drug testing outside the context of "a regular medical examina-

tion" would be constitutional. The court then observed that, because "the EMIT test is not a valid measure of whether the subject is in possession of, is using, or is under the influence of illicit drugs at the time of the test," the test "lacks a sufficient nexus to the [petitioners'] legitimate concern that * * * employees not possess, use or be under the influence of drugs while on duty" and therefore may not be constitutionally administered (*ibid.*). Finally, on the merits the court held (*id.* at 10a-12a) that while "strong privacy interests are involved here" (*id.* at 10a), the "*serious* safety concerns on the other side of the balance" (*ibid.* (emphasis in original)) justify the use of some drug tests for bus attendants, "as a part of routine employment-related medical examinations" (*id.* at 11a (footnote omitted)), in the absence of particularized suspicion.[1]

DISCUSSION

Although petitioners were the prevailing party in the court below, they ask this Court to review the remark in the court of appeals' opinion stating (Pet. App. 9a) that respondent could not constitutionally be tested in the manner she was tested because there was an insufficient nexus between the EMIT test and petitioners' interest in assuring that public employees are not impaired while on duty. Petitioners contend that, in light of this statement by the

[1] In reaching that conclusion, the court emphasized (Pet. App. 12a) that petitioners' policy of administering the test during a routine physical examination "ensur[ed] that the intrusion on the employee's privacy is minimized." Moreover, the court reiterated (*ibid.*) that "any drug test the School System employs in the future must be one that validly detects the activity with which the School System is legitimately concerned"—in this case, the "concern that employees involved in the transportation of handicapped children not be under the influence of drugs while on duty."

court of appeals, public employers will be unable to use drug tests "to deter or prevent on-the-job drug use or impairment" (Pet. 7). We share petitioners' concern that the court of appeals' opinion might be read to cast doubt on the use of drug tests that do not conclusively establish impairment while on duty; and we agree with petitioners that deterrence of on-the-job drug use is a compelling justification for drug testing. For three reasons, however, we believe that this case is an inappropriate vehicle for resolving those questions. First, as the prevailing party below, petitioners are not entitled to seek this Court's review of the judgment. Second and related, because the offending language in the court's decision is dictum, it may well be repudiated by a subsequent panel of the court of appeals. It is also possible that a future panel may read the court of appeals' opinion narrowly—as suggesting simply that when the sole stated purpose of drug testing is to determine impairment on duty, the test employed must accurately measure on-the-job impairment. Finally, this Court may well have an opportunity to consider the same issues in *Burnley* v. *Railway Labor Executives' Ass'n,* No. 87-1555, in which the government's petition for a writ of certiorari is currently pending. Accordingly, further review of the present case is unwarranted.

1. The district court enjoined petitioners from using any drug test for bus attendants, in the absence of "particularized probable cause" (Pet. App. 29a). It was from that judgment, and only from that judgment, that petitioners appealed (*id.* at 6a-7a). Agreeing with petitioners, the court of appeals held that the Fourth Amendment permits public employers to test bus attendants for drug use, at least where the test is capable of measuring present impairment and is administered during a routine physical examination (*id.* at 12a-13a). The court of appeals therefore reversed the judgment of the district court and "vacate[d]

that portion of its injunction from which appeal was taken" (*id.* at 13a).

To be sure, petitioners are justifiably troubled by the language in the court of appeals' opinion that appears to limit the kinds of drug tests that may be employed and the purposes for which they may be administered. But as this Court recently explained in *California* v. *Rooney,* No. 85-1835 (June 23, 1987) (per curiam), the Court " 'reviews judgments, not statements in opinions' " (slip op. 3, quoting *Black* v. *Cutter Labs.,* 351 U.S. 292, 297 (1956)). In the *Rooney* case, for example, the defendant moved to quash a search warrant, alleging that there was insufficient evidence of probable cause. He contended, in particular, that the police had unlawfully seized evidence from his trash bin and that the evidence seized could not be used to support the search warrant. The trial court granted the motion to quash on that ground, but the Court of Appeal reversed. Although it agreed with the defendant that the evidence seized from the trash could not be used to support the warrant, it found that the other evidence was sufficient to establish probable cause. The State then sought review in this Court, arguing that the lower courts had erred in finding the search of the trash bin to be unconstitutional. This Court granted review but thereafter dismissed the writ of certiorari as improvidently granted. The Court explained (slip op. 3) that "the judgment of the Court of Appeal was entirely in the State's favor—the search warrant which was the sole focus of the litigation was deemed valid." Moreover, the Court noted (*ibid.*), "[t]he fact that the Court of Appeal reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the California court's decision, or for the prevailing party to request [the Court] to review it." The Court acknowledged that the state court's analysis "may have been adverse to

the State's long-term interests" (*id.* at 4). But it held that that fact "does not allow the State to claim status as a losing party for purposes of this Court's review" (*ibid.* (footnote omitted)). Accord R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 46 (6th ed. 1986) (footnote omitted) ("while some winning parties have attempted to petition for certiorari, there appears to be no recorded instance where the Court has * * * granted a petition filed by a party who prevailed on the merits in the court of appeals").[2]

In the present case, as in *Rooney,* the judgment of the court of appeals was entirely in petitioners' favor: they sought to vacate that portion of the district court's decision enjoining the use of any and all drug tests for bus attendants in the absence of probable cause; and the court of appeals, holding for petitioners, vacated the judgment as requested. To be sure, as in *Rooney,* the opinion of the court of appeals contains language that may be "adverse to the [petitioners'] long-term interests" (*Rooney,* slip op. 4).

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[2] Petitioners' reliance (Pet. 6) on *Electrical Fittings Corp.* v. *Thomas & Betts Co.,* 307 U.S. 241 (1939), is misplaced. In that case, the trial court held that although respondent's patent was valid, petitioner had not infringed it. Petitioner was therefore the prevailing party, but he nevertheless sought review in this Court. This Court, entertaining the petition, reversed the judgment insofar as it had upheld the validity of the patent. The Court acknowledged (*id.* at 242 (footnote omitted)) the general rule that "[a] party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." But because the decree purported to resolve the validity of the patent, and because the district court had "adjudicat[ed] * * * one of the issues litigated" by the parties, the Court elected to consider the petition in order "to direct the reformation of the decree" (*ibid.*). In the present case, by contrast, the disputed language constitutes unwarranted dictum, by no means necessary to the disposition of the case. In any event, the current vitality of the *Electrical Fittings* case is in some doubt following the Court's decision in *California* v. *Rooney, supra.*

But as the Court made clear, that fact simply "does not allow [petitioners] to claim status as a losing party for purposes of this Court's review" (*ibid.* (footnote omitted)).

2. Because the disputed language in the court of appeals' decision is unnecessary to the actual disposition, it is entirely possible that a subsequent panel of the court of appeals will reach a different result in a case that squarely presents the issue. Indeed, the court of appeals now has before it two cases that may well afford that court an opportunity to reconsider the remarks of the panel in the present case. See *AFGE* v. *Dole,* 670 F. Supp. 445 (D.D.C. 1987), appeal docketed, No. 87-5117 (D.C. Cir. Dec. 11, 1987) (drug testing of civilian employees of the Department of Transportation, including air traffic controllers); *National Fed'n of Fed. Employees* v. *Carlucci,* No. 86-0681 (D.D.C. Mar. 1, 1988), appeal docketed, No. 88-5080 (D.C. Cir. Mar. 16, 1988) (drug testing of civilian employees of the Department of Defense, including air traffic controllers, pilots, and aircraft mechanics). "Giving [the court of appeals] an opportunity to consider the issue in a case that properly raises it is a compelling reason for [the Court] to dismiss this petition" (*Rooney,* slip op. 6 (footnote omitted)).

Moreover, the statements in the court of appeals' opinion challenged by petitioners are ambiguous. They could mean, as petitioners suggest, that the only legitimate purpose of employee drug testing is to measure impairment while on duty, and that the tests employed must therefore accurately determine on-the-job impairment. But the statements could also mean that when a public employer has advanced as its sole purpose the detection of on-the-job impairment—and has advanced no other purpose—the tests used must be able to measure present impairment. A future panel in the District of Columbia Circuit may

well choose the latter, narrower reading of the court of appeals' decision and therefore, in an appropriate case, approve a drug test that is incapable of accurately determining current impairment. The fact that the challenged statements are not only dictum but are also ambiguous further militates against review in this case.

3. Finally, we believe that this Court presently has before it a case that may well afford it the opportunity to address the issues raised by petitioners. In *Burnley* v. *Railway Labor Executives' Ass'n,* No. 87-1555, in which the government's petition for a writ of certiorari is now pending, the Ninth Circuit held that the Fourth Amendment prohibits blood and urine tests of railroad employees who are involved in certain train accidents and fatal incidents. Like the court below, the Ninth Circuit objected to urinalysis testing—at least, without a supplemental blood test—in part because it is incapable of discerning on-the-job drug impairment. We believe that there are convincing answers to that objection and that the *Burnley* case is an appropriate vehicle for stating them.[3]

4. The other reasons suggested by petitioners for review in this case are unpersuasive. While it is true that safety concerns are not the primary justification for the drug testing program in *National Treasury Employees Union* v. *von Raab,* No. 86-1879 (Pet. 7-8), they are the centerpiece of the testing program in *Burnley.* For the reasons stated above, we believe that *Burnley* is a more

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[3] The Court also has before it another case raising the issue of employee drug testing in the absence of particularized suspicion. *National Treasury Employees Union* v. *von Raab,* No. 86-1879. That case, however, does not clearly present the question of the inability of drug tests to discern on-the-job impairment, since the Customs Service implemented a urinalysis program to determine whether its employees in sensitive positions have used narcotics at any time, whether on the job or otherwise.

appropriate vehicle for addressing those concerns. Moreover, petitioners err when they suggest (Pet. 8) that the circuits are divided on the question whether employers may conduct drug tests in order to deter illicit drug use; neither the Ninth Circuit in *Burnley,* nor the court of appeals in this case, held, as petitioners contend (Pet. 8), "that urine drug tests may only be used to detect whether incidents that have already occurred were caused by drug impairment." [4] Finally, there is no reason to hold the petition in this case for disposition in light of *von Raab* (Pet. 17); petitioners have already prevailed in the court of appeals, and the court below is unlikely to make changes in the language of its opinion to accommodate the decision of this Court in *von Raab.*

CONCLUSION

The petition for a writ of certiorari should be denied.

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[4] The court below identified as a "legitimate justification for the drug testing program" the School System's concern "that employees involved in the transportation of handicapped children not be under the influence of drugs while on duty" (Pet. App. 12a). But the court did not state, as petitioners surmise, that this is the only legitimate justification for a drug testing program.

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